Nos. 93-1456 and 93-1828

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., ARKANSANS FOR GOVERNMENTAL REFORM, INC., FRANK GILBERT, GREG RICE, LON SCHULTZ, and SPENCER PLUMLEY,
Petitioners,

v.

RAY THORNTON, *et al.*,
Respondents.

WINSTON BRYANT,
ATTORNEY GENERAL OF ARKANSAS,
Petitioner,

v.

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR PETITIONERS U.S. TERM LIMITS, INC., *et al.*

JOHN G. KESTER *
TERRENCE O'DONNELL
TIMOTHY D. ZICK

WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5069

Attorneys for Petitioners U.S. Term Limits, Inc., et al.

Of Counsel:

H. WILLIAM ALLEN
ALLEN LAW FIRM
212 Center Street
Little Rock, Arkansas 72201

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does Article I of the Constitution forbid a state to decline to print on its election ballots the names of multi-term incumbents in the House of Representatives and Senate?

LIST OF PARTIES

Petitioners in this Court are U.S. Term Limits, Inc., Arkansans for Governmental Reform, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumley.

Respondents in this Court and parties to the proceeding in the Supreme Court of Arkansas are:

Representatives and Senators: Ray Thornton, Blanche Lambert, Dale Bumpers, David Pryor, Jay Dickey, and Tim Hutchinson.

State legislators: James C. "Jim" Scott, W.D. "Bill" Moore, Jr., Mike Ross, Wayne Dowd, Neely Cassady, George Hopkins, Jean C. Edwards, Jay Bradford, Travis A. Miles, Lu Hardin, Eugene "Bud" Canada, Charlie Cole Chaffin, Vic Snyder, Jerry D. Jewell, Cliff Hoofman, Stanley Russ, Mike Beebe, Roy C. "Bill" Lewellen, Mike Everett, Steve Bell, Allen Gordon, Jon S. Fitch, Morrrill Harriman, Mike Bearden, Jerry P. Bookout, Mike Todd, Nick Wilson, Steve Luelf, Joe E. Yates, David R. Malone, Clarence Bell, Jack Anderson Gibson, Bill Gwatney, Reid Holiman, Railey A. Steele, Louis McJunkin, Jerry Hunton, B.G. Hendrix, Carolyn Pollan, Ralph "Buddy" Blair, Jr., W.R. "Bud" Rice, Ode Maddox, Gus Wingfield, Hoye D. Horn, David Beatty, Arthur Carter, Charles Whorton, Jr., Frank J. Willems, Lloyd R. George, Bob J. Watts, L.L. "Doc" Bryan, Bruce Hawkins, James C. Allen, John W. Parkerson, John H. Dawson, Billy Joe Purdom, Randy Thurman, W.H. "Bill" Sanson, Bill Stephens, H. Lacy Landers, Bobby G. Newman, Jodie Mahony, Phil Wyrick, Mark Pryor, Carol "Coach" Henry, James G. Dietz, Doug Wood, Mike Wilson, William H. Townsend, Larry Goodwin, John E. Miller, John Paul Capps, J. Sturgis Miller, Josetta E. Wilkins, Jacqueline J. Roberts, Charlotte Schexnayder, Jimmie Don McKissack, Michael K. Davis, Thomas G. Baker, Albert "Tom" Collier, V.O. "Butch" Calhoun, Wanda Northcutt, N.B. "Nap" Murphy, Jime Holland, Tim Wooldridge, Bobby G. Wood,

Bobby L. Hogue, Owen Miller, J.L. "Jim" Shaver, Pat Flanagin, Wayne Wagner, Christene Brownlee, Lloyd C. McCuiston, Jr., Bob McGinnis, Ernest Cunningham, Bynum Gibson, Jim Von Gremp, Dennis Young, Armil O. Curran, D.R. "Buddy" Wallis, Vada Sheid, Greg Wren, E. Ray Stalnaker, David Choate, Bill Fletcher, Marian D. Owens, and Claud V. Cash.

Others: State of Arkansas, Republican Party of Arkansas, Democratic Party of Arkansas, Bobbie E. Hill, Dick Herget, Americans for Term Limits, Steve Goss, W. Asa Hutchinson, George O. Jernigan, Jr., Mark Riable, and Bill Walters.

LIST PURSUANT TO RULE 29.1

Petitioner U.S. Term Limits, Inc., is a non-profit corporation incorporated under the laws of the District of Columbia. It has no parent companies or subsidiaries. Arkansans for Governmental Reform, Inc., is a not-for-profit corporation incorporated under the laws of Arkansas. It has no parent companies or subsidiaries. Americans for Term Limits is a not-for-profit corporation incorporated under the laws of Arkansas. On information and belief, it has no parent companies or subsidiaries.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 93-1456 and 93-1828

U.S. TERM LIMITS, INC., *et al.*,
Petitioners,

v.

RAY THORNTON, *et al.*,
Respondents.

WINSTON BRYANT,
ATTORNEY GENERAL OF ARKANSAS,
Petitioner,

v.

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR PETITIONERS U.S. TERM LIMITS, INC., *et al.*

OPINIONS BELOW

The unreported opinions of the Circuit Court of Pulaski County, Arkansas are at P.C.A. 45a, and 53a. The opinions of the Supreme Court of Arkansas are reported at 316 Ark. 251 and 872 S.W.2d 349, and appear at P.C.A. 1a; its order denying rehearing is at P.C.A. 44a.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered March 7, 1994, and rehearing was denied March 14, 1994. P.C.A. 1a, 44a. The petition for certiorari in No. 93-1456 was filed March 17, 1994, and granted June 20, 1994. J.A. 208. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 73 of the Constitution of Arkansas and pertinent portions of the Constitution of the United States and statutory authorities are reproduced in the Appendices hereto, respectively pp. 1a and 3a, *infra*.

STATEMENT

On November 3, 1992, 60% of the voters of Arkansas adopted the Arkansas Constitution's Amendment 73, declaring:

> "The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers."

P. 1a, *infra*.[1] The amendment provides that after being elected three times (six years) to the U.S. House of Representatives, or twice (twelve years) to the U.S. Senate, an incumbent's name will not continue to appear on the printed ballot for reelection to those respective offices. *Id.*, § 3, p. 2a, *infra*. However, such a person may nevertheless continue to run for election to that office, and may serve if elected. *Id.*, P.C.A. 15a.[2]

A voter brought this suit challenging Amendment 73 on several state and federal constitutional grounds. J.A. 41. Petitioners, who are its official sponsor and supporters, J.A. 72, 101-02, intervened as defendants. J.A. 90, 147. The Circuit Court of Pulaski County, Arkansas, without taking evidence granted summary judgment,

---

[1] The Amendment received 59.9% of the vote cast and carried all but six of Arkansas' 75 counties. J.A. 164-66.

[2] Amendment 73 separately establishes term limits of varying length for offices in the executive and legislative branches of the state government. *Id.*, §§ 1, 2. These provisions were upheld by the Supreme Court of Arkansas without dissent against First and Fourteenth Amendment challenge. P.C.A. 20a, 27a, 42a.

holding Amendment 73 "void and invalid" under Arkansas law for a defect in its enacting clause. P.C.A. 61a. The court added its opinion that none of Amendment 73's provisions would violate the First or Fourteenth Amendments, but that its ballot restrictions on muti-term incumbents seeking reelection to the House or Senate would violate Article I of the Constitution of the United States. P.C.A. 59a-60a.

On appeal, the Supreme Court of Arkansas issued five opinions, three for the majority and two dissents. It held that Amendment 73 had been adopted in compliance with state law, but then ruled by a vote of 5-2 that insofar as Amendment 73 restricts ballot access for multi-term congressional incumbents, it violates Article I. A plurality opinion of three justices acknowledged that under Amendment 73 such an incumbent "is not totally disqualified and might run as a write-in candidate" or serve after appointment to a vacancy. P.C.A. 15a. However, without elaboration it concluded that

> "These glimmers of opportunity for those disqualified, though, are faint, indeed—so faint in our judgment that they cannot salvage Amendment 73 from constitutional attack."

P.C.A. 15a. On that basis it ruled that Amendment 73 had established a disqualification for being a Representative or Senator equivalent to those in Article I, §§ 2 and 3. It then held that, although the point was "not specifically addressed" in the Constitution, P.C.A. 12a, nevertheless "[q]ualifications set out in the U.S. Constitution" in Article I, §§ 2 and 3, "fix the sole requirements for congressional service." P.C.A. 14a-15a.

One dissent, citing two federal court of appeals decisions,[3] reasoned that Amendment 73 "merely makes it more difficult for an incumbent to be elected," and "a person is qualified within the meaning of Article I of the United States Constitution if permitted to serve if elected."

---

[3] *Hopfmann* v. *Connolly*, 746 F.2d 97 (1st Cir. 1984), *vacated in part on other grounds*, 471 U.S. 459 (1985); *Joyner* v. *Mofford*, 706 F.2d 1523 (9th Cir.), *cert. denied*, 464 U.S. 1001 (1983).

P.C.A. 37a. Another dissenter concluded that "the qualifications [in Article I, §§ 2 and 3] are to be the *minimum* requirements rather than the *exclusive* requirements." P.C.A. 34a (emphasis in original). Rehearing was denied. J.A. 207. This Court granted certiorari. J.A. 208, 209.

SUMMARY OF ARGUMENT

1. Amendment 73 does not set a qualification for office. Certainly it was advocated by supporters of turnover in elective offices, and is designed to lessen the overwhelming election advantages, many of them governmentally conferred, that are enjoyed by multi-term incumbents. But it does so only by not continuing to print such incumbents' names on ballots. It does not disqualify them from running, being elected, or serving in office.

This Court has never held that Article I bars a state ballot restriction. That claim once was urged against a California law that restricted access to the ballot based on prior political affiliation and activity. *Storer* v. *Brown*, 415 U.S. 724 (1974). The argument that the ballot law was a qualification and violated Article I was dismissed by this Court with incredulity, as "wholly without merit." 415 U.S. at 746 n.16. Practically all state election laws, and ballot regulations in particular, influence election outcomes—none more so than the ballot restrictions accompanying primary-election laws, which States have enacted for nearly a century now, and whose usual beneficiaries are incumbents. *E.g., Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983). Until this year the courts have consistently held that Article I simply is not implicated by state laws that deny benefits or make election more difficult, but do not prohibit election and service. Pp. 15-17, *infra*.

The holding of the Arkansas court is that not printing a multi-term incumbent's name on the ballot amounts to a prohibition on holding office. But both history and the record in this case fail to support that assertion. Members of the House and Senate have been elected by write-in, including a Representative from Arkansas. And

the record here is that name recognition along with the many other advantages of congressional incumbency make a multi-term incumbent's opportunity for write-in victory substantial. Pp. 17-19, *infra*.

States are not free, of course, to pass any ballot restrictions they want. State ballot-access laws can properly be, and regularly are, subjected to constitutional testing—but under the familiar standards of the Fourteenth Amendment. *E.g., Norman* v. *Reed,* 112 S. Ct. 698 (1992); *Burdick* v. *Takushi,* 112 S. Ct. 2059 (1992); *Munro* v. *Socialist Workers Party,* 479 U.S. 189 (1986). To depart from *Storer* v. *Brown* and the many decisions like it, and now equate a state ballot regulation with a disqualification for office, would open to Article I challenge the state primary laws and hundreds of other provisions by which fifty states tightly regulate congressional elections. For the courts to try to decide which of these state election laws should now be recharacterized as qualifications would be particularly unnecessary when the institution affected—the Congress—is specifically assigned full authority in Article I, § 4, to override Arkansas Amendment 73, or any other state law on congressional elections that it deems unwise.

2. Even if the Arkansas Supreme Court were correct in its assertion that Amendment 73 added qualifications for holding congressional office, still Article I would not be violated. Article I, in both § 2 and § 4, explicitly assigns the States broad power over congressional elections. It restricts such state regulations only by establishing Congress' power to annul them, which later was supplemented by the Fourteenth Amendment. Its disqualification provisions, in Article I, §§ 2 and 3, set minimums, but contain no restrictions on state laws.

The Arkansas court believed that Article I by implication takes away state power without saying so. But from the time of Chief Justice Marshall, this Court has repeatedly declined to imply prohibitions of state power from the Constitution's silence. *Sturges* v. *Crowninshield,* 4 Wheat. 12, 193 (1819); *Barron* v. *Baltimore,* 7 Pet.

243, 249 (1833); *Goldstein* v. *California*, 412 U.S. 546, 552 (1973). The Tenth Amendment further confirms that constitutional limitations on state power are normally express, *e.g.*, Article I, § 10, and only rarely to be implied.

It is no accident that the Constitution's text is barren of the prohibition the Arkansas Supreme Court implied. A clause that would have made the disqualifications in Article I, § 2, exclusive was deleted from an early draft. Thereafter exclusivity was not proposed or considered, and although the authority of *Congress* to add disqualifications was doubted by some, *state* power was never addressed. Indeed, when a proposal to set property requirements or specify a congressional power to do so was defeated—with some delegates commenting that the subject was not appropriate for national uniformity—others added that specifying power to set property qualifications might be misunderstood to negate power to set other qualifications. See pp. 38-42, *infra*.

What the Constitution allowed the States to do was demonstrated by the added qualifications for Congress that over half of them promptly enacted. Immediately upon ratifying the Constitution, States passed laws requiring that Representatives be district residents; establishing nominating and screening processes for candidates; and even requiring that Representatives be landed property owners. (The States similarly added residence and property requirements for Presidential electors in addition to the disqualifications specified in Article II.) In fact, although some doubts had been expressed as to whether *Congress* (as opposed to the States) could add disqualifications, the First Congress without hesitation enacted the first of more than 200 years of federal statutes adding disqualifications for conviction of certain crimes, a practice it has followed "frequently and of old." *De Veau* v. *Braisted*, 363 U.S. 144, 159 (1960) (Frankfurter, J., announcing judgment). Many are still in force, as are similar state enactments which bar from election felons,

state officeholders, persons who are not voters, and a wide variety of other categories. See pp. 27-29, *infra*.

The Arkansas plurality cited *Powell* v. *McCormack*, 395 U.S. 486 (1969); but there this Court expressly declined to consider state power, and held only that when a single House sits as "Judge," then the term "Qualifications" as used in Article I, § 5, refers only to those set forth in the Constitution. See *Nixon* v. *United States*, 113 S. Ct. 732, 740 (1993); *Buckley* v. *Valeo*, 424 U.S. 1, 133 (1976). The Arkansas opinion postulated a need for "uniformity" in qualifications for Congress. P.C.A. 14a. But state congressional-election laws have never been uniform. And no State whose people limit how long their representatives will stay in a House of Congress casts any burden on other States, any more than if its people voted unwisely against a particular candidate. In fact, the States' central role in selecting their national representatives is an important protection in maintaining the balance of the federal system. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 (1985).

It would be late in the day, given the volume of contemporaneous state, and even federal, disqualification legislation, and the ballot-restriction and disqualification laws in dozens of jurisdictions, now to hold that it all was and is unconstitutional, under an unstated implication from the Constitution's silence. Nor is it necessary in any sense to do so. No federal function is threatened. No majority is seeking to suppress ideas or to impose its will on a powerless minority or protected class. The voters of Arkansas were not altering the structure of the federal government. They were simply trying, in choosing their representation, to open the political process and to remove one of the many election advantages that long-term incumbents enjoy. The usual state power to regulate congressional elections should not be eliminated by an unstated negative implication when (1) the Constitution is silent; (2) two centuries of lawmaking are to the contrary; and (3) Congress, although specifically empowered by the Constitution to do so, has not seen fit to interfere.

ARGUMENT

I. ARTICLE I ASSIGNS THE STATES BROAD POWER TO REGULATE CONGRESSIONAL ELECTIONS.

Article I establishes a framework for conduct of congressional elections in which state authority is normally decisive.

A. Article I, § 2, Authorizes "Wide Discretion" in Choosing Representatives.

Article I, § 2, first directs that Representatives are to be chosen by the people of each State, with voters whose qualifications are the same as those of voters for the most numerous branch of the state legislature.

> "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

By this clause, this Court has held,

> "the states are given . . . a wide discretion in the formulation of a system for the choice by the people of representatives in Congress."

United States v. *Classic*, 313 U.S. 299, 311 (1941).

> "[T]he states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 . . . ."

Id. at 315. Thus, for example, the States' power, even without congressional sanction, to elect a House member by people of a district instead of by the people of the State, as long as districts are reasonably equal in population, has "never been doubted." *McPherson* v. *Blacker*, 146 U.S. 1, 26 (1892); *cf. Wesberry* v. *Sanders*, 376 U.S. 1 (1964).

B. Article I, § 3, Provided for Choosing Senators as the State Legislatures Saw Fit.

The choosing of Senators was placed by Article I, § 3, in the discretion of the state legislatures:

> "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . ."

The legislatures' methods varied, as did their criteria for election.[4] In 1913 the Seventeenth Amendment reassigned this electoral power to parallel Article I, § 2.[5]

C. Article I, § 4, Grants "Broad" Power To Regulate the Manner of Elections.

The conduct of elections to both Houses of Congress was further specifically assigned to the States, subject to authority granted to Congress to override state laws or enact laws of its own on the subject. Section 4 of Article I provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature [6] thereof; but the Congress may at any time by Law make or alter such

---

[4] At the first elections for Senators, in some legislatures both houses voted jointly (*e.g.*, Virginia and New Jersey). See 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788-1790 281 (G. DenBoer, *et al.*, eds. 1984); 3 *id.* 25 (1986). Some voted separately (*e.g.*, Massachusetts and Connecticut). 1 *id.* 514-20 (1976); 2 *id.* 28. New Hampshire apparently had one house nominate, the other approve. 1 *id.* 783. New York could not agree on any procedure. 3 *id.* 513. Maryland formally required that one Senator reside on the Eastern Shore, the other on the Western Shore. 2 *id.* 146-49.

[5] "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

[6] The phrase "by the Legislature thereof" has long been construed to include initiatives, constitutional provisions, and other state methods of enacting laws. *Smiley* v. *Holm*, 285 U.S. 355, 372 (1932); *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 569-70 (1916).

> Regulations, except as to the Places of chusing Senators."

As Madison explained "Times, Places and Manner," "These were words of great latitude." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 240 (rev. ed. 1966) (hereinafter "FARRAND").[7] This provision became controversial in the state ratifying conventions only because of the power it granted to Congress.[8] It was defended as essential, because otherwise the States would be free to do whatever they chose. See THE FEDERALIST No. 59 at 399, 402-03 (Hamiltion) (J. Cooke ed. 1961) (edition herein cited unless otherwise indicated).

Article I, § 4, thus confirms "a broad power." *Tashjian* v. *Republican Party*, 479 U.S. 208, 217 (1986); *accord, United States* v. *Classic, supra.* It has never been confined to minor matters of election procedure.[9] "The breadth of those powers" allows the States, unless Congress acts, "to provide a complete code for congressional elections." *Roudebush* v. *Hartke*, 405 U.S. 15, 24 (1972), *quoting in part Smiley* v. *Holm*, 285 U.S. 355,

---

[7] The same word "manner" was used in the provision of the Articles of Confederation in accordance with which some States set term limits for their representatives (beyond those in the Articles themselves): "delegates shall be annually appointed in such manner as the legislature of each State shall direct." Art. of Confed. V; see Md. Const., Art. XXVII (1776); Pa. Const., § 11 (1776); N.H. Const., Pt. II (1784); Vt. Const., Art. XXVII (1786).

[8] *E.g.*, 4 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 50 (1836) (Governor Johnston of North Carolina noting that several states had proposed amendments to limit Congress' power over elections); 2 *id.* 49 (Massachusetts) 325-26 (New York); 3 *id.* 175 (Virginia); 4 *id.* 52 (North Carolina) (hereinafter "ELLIOT").

[9] See *Oregon* v. *Mitchell*, 400 U.S. 112, 117-18 (1970) (Black, J., announcing judgment that Article I, § 4, empowers Congress to lower age qualification for voters for Congress to eighteen years). In the federal Voting Rights Act, 79 Stat. 445 (1965), as amended, 42 U.S.C. §§ 1971, 1973-1973bb-1, Congress also under the Fourteenth Amendment vastly altered the establishment of congressional districts, the qualifications of voters, and the likelihood of particular categories of candidates being elected.

366 (1932).[10] The States' authority over congressional elections, unless Congress steps in, is "matched by state control over the election process for state offices." *Tashjian* v. *Republican Party*, 479 U.S. 208, 217 (1986). Under both § 2 and § 4 of Article I,

> "the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates."

Storer v. *Brown*, 415 U.S. 724, 730 (1974).

D. Article I Includes Minimum Qualifications.

Article I disqualifies from membership in the House or Senate persons who do not meet specified minimums of age, residency, and citizenship, and includes other requirements as well. The second clause of Article I, § 2, provides:

> "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

With respect to Senators, Article I, § 3, provides that

> "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." [11]

---

[10] A narrow interpretation of "Times, Places and Manner," to exclude primary laws affecting which names appeared on the general election ballot, was adopted in the opinion of Justice McReynolds in *Newberry* v. *United States*, 256 U.S. 232, 257 (1921), but was explicitly rejected by this Court in *United States* v. *Classic*, *supra*, 313 U.S. at 317.

[11] Although some litigants and commentators lately refer to these as "the Qualifications Clauses," no such terminology was used

Madison grouped with these the fourth requirement, in Article I, § 6, that disqualifies any person holding other federal office from sitting in Congress.[12] See THE FEDERALIST No. 52 at 355. In addition, Article VI requires that members of Congress "be bound by Oath or Affirmation, to support this Constitution,"[13] and Article I, § 3, cl. 7, authorizes disqualification from federal office as a punishment in cases of impeachment.[14]

Thus the three disqualifications listed in §§ 2 and 3 of Article I were never exclusive in the Constitution itself. Other qualifications for federal offices were contemplated by Article VI, which forbids religious tests. The most likely source of such tests would be the States, some of which imposed them in 1789; without this prohibi-

---

at the Constitutional Convention, and this Court has used the term "Qualifications Clause" to refer instead to Article I, § 2, cl. 1, which sets the "Qualifications" of voters. See *Tashjian* v. *Republican Party*, 479 U.S. 208, 225 (1986).

[12] Article I, § 6, provides in part:

> "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

In addition, section 3 of the Fourteenth Amendment added a disqualification of officials who after taking an oath to support the Constitution engage in rebellion against the United States or give aid and comfort to its enemies.

[13] Article VI, cl. 3, provides:

> "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

The oath requirement thus constitutes a constitutional qualification for holding state as well as federal office; but it has never been claimed to be an exclusive one. *Cf. Bond* v. *Floyd*, 385 U.S. 116, 130-31 (1966).

[14] Article I, § 3, cl. 7, provides in part:

> "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States...."

tion, the offices to which state religious tests might otherwise apply were Representative and Senator.[15]

E. The Tenth Amendment Confirms State Authority.

The Tenth Amendment provides that

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As a limitation on the powers of Congress, the amendment "states but a truism that all is retained which has not been surrendered." *New York* v. *United States,* 112 S. Ct. 2408, 2418 (1992), *quoting United States* v. *Darby,* 312 U.S. 100, 124 (1941). But applied to state power, the Tenth Amendment means something more. It confirms the understanding that unless the Constitution specifies or inescapably implies otherwise, legislative power of the States and people is undisturbed. Congress requires constitutional authorization to legislate; the States do not, and may exercise all powers not vested exclusively in the federal government, or prohibited to the States by the Constitution itself or by valid federal law or treaty. *Gregory* v. *Ashcroft,* 501 U.S. 452, 457 (1991); *Tafflin* v. *Levitt,* 493 U.S. 455, 458 (1990).[16] State laws, moreover, receive a presumption of constitutionality. *Fletcher* v. *Peck,* 6 Cranch 87, 128 (1810).

The powers which "remain in the State governments are numerous and indefinite." *Gregory* v. *Ashcroft, supra,* 501 U.S. at 458, quoting THE FEDERALIST No. 45 at 292-93 (C. Rossiter ed. 1961) (Madison). And the States' role in elections is particularly vital, for the Framers "gave the States a role in the selection of both

---

[15] See, *e.g.*, S.C. Const., arts. XII, XIII (1778); Pa. Const., § 10 (1776); *cf.* Parliamentary Test Act, 30 Car. II, stat. 2 (1677) (requiring religious oath and disqualifying Roman Catholics from Parliament).

[16] The Arkansas plurality apparently misunderstood this, P.C.A. 12a, stressing that no national term-limits requirement had been required by the Constitution, and also that

> "the framers of the U.S. Constitution did not expressly endow the States with this same authority."

the Executive and the Legislative Branches of the Federal Government" in order to "protect the States from overreaching by Congress." *Garcia* v. *San Antonio Metro. Transit Authority*, 469 U.S. 528, 551 (1985); see also *New York* v. *United States, supra*, 112 S. Ct. at 2418. The ability of the people of the States to choose who is to make federal laws for them is a practical and essential regulator of the federal balance. See Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543 (1954).[17]

II. THE RECORD DOES NOT SUPPORT THE HOLDING THAT AMENDMENT 73 CREATES A DISQUALIFICATION LIKE THOSE IN ARTICLE I.

Lacking the benefit of having one's name among the few on the ballot is of course a significant drawback to a

---

[17] Justice Joseph Story in his treatise argued that because the offices of Representative and Senator had been created by the Constitution, no powers with respect to them could be "reserved" by the Tenth Amendment to the States, for "no powers could be reserved to the states, except those, which existed in the states before the constitution was adopted." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 625 (1833); see also *id.* § 626. But the Tenth Amendment assigned to the States or people all powers which were not granted to the federal government or denied to the States; the term "reserved" is not temporal, but refers to the federal structure, with States exercising whatever powers were not assigned to the federal government, whether or not such powers had been previously exercised. Moreover, the Amendment was adopted in 1791, after Article I and its electoral system had already been adopted, and indeed many States had already passed laws adding particular qualifications for Congress in 1788, before the Constitution took effect. See pp. 25-27, *infra*. Finally, regulating elections to the national legislative body was not a new power previously unknown to the States; they had chosen their representatives in the Congress of the Articles of Confederation by any means they wanted, and some indeed had set term limits. See n. 7, *supra*. The exercise of essentially the same power under the superseding Constitution was nothing so novel as to be outside the scope of the Tenth Amendment. *Cf.* THE FEDERALIST No. 39 at 256 (Madison): "the proposed Government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." (Emphasis in original.)

politician seeking reelection. But nothing in the record established that not continuing to appear on the ballot is the same as disqualification, and in fact the record demonstrated otherwise. Not surprisingly, this Court, federal courts of appeals, and other state supreme courts have held in similar situations that state restrictions on appearing on the printed ballot for Congress do not rise to the level of disqualifications for office.

A. This Court Does Not Treat Ballot Restriction as Disqualification From Office.

Printed election ballots came into use in the United States beginning in the late 1800's,[18] and primary-election laws soon followed. States concurrently enacted a wide variety of laws restricting appearance on the ballot to a few candidates—usually party nominees and persons who can meet petition requirements.[19] The constitutionality of state primary laws has never been seriously doubted. *Cf., e.g., United States* v. *Classic, supra*, 313 U.S. at 318. Today States also have myriad other laws that tightly restrict access to the printed ballot. See examples at Appendices F and G, pp. 43-87, *infra*.

The claim that a state law denying ballot access violates Article I has been considered and rejected by this Court. In *Storer* v. *Brown*, 415 U.S. 724 (1974), a California law barred from the printed ballot any independent candidate for the House of Representatives who had been affiliated with a political party within the year prior to the preceding primary, or had voted in the primary. Two candidates for the House argued at length

---

[18] Prior to that time, elections for Congress were conducted by voters' writing the name of the person favored on a slip of paper, preparing their own ballots, or *viva voce*. See *Burdick* v. *Takushi, supra*, 112 S. Ct. at 2070 (Kennedy, J., dissenting).

[19] *E.g.*, Ark. Const., amend. 29, §5; see pp. 27-29, *infra*. See generally L. FREDMAN, THE AUSTRALIAN BALLOT 46-48 (1968); C. MERRIAM & L. OVERACKER, PRIMARY ELECTIONS (1928). State laws also restrict appearance on printed ballots in the primary elections, generally to persons collecting sufficient signatures, paying fees, meeting party affiliation requirements, and not being subject to various disqualifications. See pp. 28, 74a-80a, *infra*.

to this Court that the ballot restriction established a new qualification for election to the House, and that Article I implicitly forbade this. After rejecting a First and Fourteenth Amendment challenge, this Court disposed of the Article I argument in a footnote:

> "Appellants also contend that [the State law] purports to establish an additional qualification for office of Representative and is invalid under Art. I, § 2, cl. 2, of the Constitution. The argument is wholly without merit."

415 U.S. at 746 n.16. This Court characterized the law as "an absolute bar to candidacy, and a valid one." *Id.* at 737. But with respect to Article I, it explained,

> "The non-affiliation requirement no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support."

Id. at 746 n.16. This Court also pointed out the availability of election by write-in. *Id.* at 736 n.7.

Other cases follow the same reasoning. As the First Circuit explained,

> "the test to determine whether or not the 'restriction' amounts to a 'qualification' . . . is whether the candidate 'could be elected if his name were written in by a sufficient number of electors.' "

Hopfmann v. *Connolly,* 746 F.2d 97, 103 (1st Cir. 1984), *vacated in part on other grounds,* 471 U.S. 459 (1985), *quoting in part State ex rel. Johnson* v. *Crane,* 65 Wyo. 189, 206-07, 197 P.2d 864, 871 (1948). Similarly, the Ninth Circuit cited this Court's decision in *Storer* in holding that a state law forbidding state officials to run for Congress while in office was not an Article I qualification, even though it had the practical effect of chilling candidacy by persons who did not want to give up their jobs. *Joyner* v. *Mofford,* 706 F.2d 1523, 1531 (9th Cir.), *cert. denied,* 464 U.S. 1002 (1983). Many other cases stand for the rule that state ballot

regulations are limited under the federal Constitution not by Article I but, if at all, by the Fourteenth Amendment or other explicit restrictions on state laws.[20]

B. The Record Does Not Support the Assumption That Established Incumbents Cannot Win Reelection by Write-In.

The linchpin of the Arkansas plurality's reasoning, on which its entire opinion depended, was an assertion: that a long-term incumbent's opportunity to win reelection by write-in was insignificant. The plurality opinion acknowledged, and held as a matter of state law, that under Amendment 73 a long-serving congressional incumbent "is not totally disqualified and might run as a write-in candidate," and also might serve if appointed by the governor to fill a vacancy. P.C.A. 15a. But it dismissed those avenues to holding office in a single sentence:

> "These glimmers of opportunity for those disqualified, though, are faint, indeed—so faint in our constitutional judgment that they cannot salvage Amendment 73 from constitutional attack."

Id. No evidence was presented to the state courts to support that conclusion, other than election statistics showing that obsure write-in candidates do not win elections. As its only authority, the opinion cited a district court opinion that—relying on a comparable metaphor—had scoffed at the write-in option available under Washington's similar law.[21]

---

[20] *E.g., Public Citizen, Inc.* v. *Miller*, 992 F.2d 1548 (11th Cir. 1993), *affirming* 813 F. Supp. 821, 833 (N.D. Ga. 1993); *State ex rel. O'Sullivan* v. *Swanson*, 127 Neb. 806, 808, 257 N.W. 255, 255-56 (1934); *State ex rel. McCarthy* v. *Moore*, 87 Minn. 308, 92 N.W. 4 (1902).

[21] *Thorsted* v. *Gregoire*, *supra*, 841 F. Supp. 1068, 1079 (W.D. Wash. 1994) ("a pinhole of opportunity"), *appeal pending sub nom. Thorsted* v. *Munro*, Nos. 94-35222 etc. (9th Cir.), *cert. denied sub nom. Citizens for Terms Limits* v. *Foley*, 114 S. Ct. 2727 (1994). The Washington court issued its opinion on summary judgment in the face of affidavits of experts, both political scien-

The opinion's absolute assertion is contrary to the record and historically incorrect.[22] For example, three current Members were once elected to Congress by write-ins, J.A. 172-77—including one who had unsuccessfully sought ballot access in that very election.[23] Other congressional write-ins have succeeded, J.A. 202, including one from Arkansas itself. J.A. 169-70, 201-02. The better known the candidate, the greater the opportunity for success. J.A. 201, 203. In fact, the Arkansas Supreme Court had before it a political scientist's uncontroverted affidavit, J.A. 201, 203-04, that

> "although a write-in candidacy is more difficult to win than one in which a candidate's name is on the ballot, it is far from impossible for a write-in candidate to win, especially if the write-in candidate has substantial name identification. . . . Most write-in candidacies in the past have been waged by fringe candidates, with little public support and extremely low name identification. In instances when write-in candidates have been well known, however, they often have been successful. . . . The typical write-in incumbent almost certainly will have a higher name recognition, more sophisticated campaign skills, ongoing endorsements from political allies and newspapers, a well-honed talent for working the media, the good will of constituents, and a much larger campaign fund than the non-incumbents on the ballot . . . . Given a choice, any rational candidate would prefer to be a well known incumbent write-in candidate

---

tists and former congressmen, that a well-known incumbent would have a powerful opportunity to win as a write-in candidate.

[22] Lacking any evidentiary foundation, the ruling is one of law. Even if treated as a factual finding, the state court's conclusion still would not bind this Court insofar as a determination of federal law depends on it. *E.g., Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 659 (1945), and cases there cited.

[23] See J.A. 175-76 (Rep. Skeen): *Skeen* v. *Hooper*, 631 F.2d 707, 711 (10th Cir. 1980) (rejecting claim "[t]hough write-in campaigns are generally a difficult thing"), *citing Jenness* v. *Fortson*, 403 U.S. 431, 434 (1971).

rather than a political novice who happens to have his or her name printed on the ballot."

Even in the context of little-known candidates, this Court, unlike the Arkansas court, has often treated the availability of write-in election as significant in rejecting Fourteenth Amendment challenges to election laws.[24] This Court also holds, moreover, that *a priori* characterizations are not adequate, and requires that a ballot regulation not be held unduly burdensome without proper findings of fact. *Mandel* v. *Bradley*, 432 U.S. 173, 178 (1977); *Storer* v. *Brown, supra*, 415 U.S. at 742. On the present record, the only possible findings would be exactly contrary to the decision on review.

C. The Benefit of Continued Ballot Access Is Less Crucial for Long-Time Incumbents.

1. *Congressional Incumbents Receive Many Other Benefits.*

Long-time congressional incumbents are not ordinary candidates. Placed at their disposal are taxpayer-furnished staffs, expense accounts, offices in their districts, media broadcast studios and press aides, travel allowances, free postage privileges, free stationery, easy access to television news and talk shows, and abundant oppor-

---

[24] See *Storer* v. *Brown, supra*, 415 U.S. at 736 n.7 ("we note that the independent candidate who cannot qualify for the ballot may nevertheless resort to the write-in alternative provided by California law"); *Jenness* v. *Fortson, supra*, 403 U.S. at 434, 438 ("Georgia freely provides for write-in votes. . . . no limitation whatever . . . on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that write-in vote counted"). In two special situations—where state election laws imposed unreasonably high filing fees, or effectively destroyed "the constitutional right of citizens to create and develop new political parties," *Norman* v. *Reed*, 112 S. Ct. 698, 705 (1992)—this Court held that the restriction violated the Fourteenth Amendment even when tempered by the write-in alternative. See *Anderson* v. *Celebrezze*, 460 U.S. 780, 799 n.26 (1983); *Lubin* v. *Panish*, 415 U.S. 709, 719 n.5 (1974); see also *id.* at 722 (Blackmun, J., joined by Rehnquist, J., concurring) ("I would regard a write-in procedure, free of fee, as an acceptable alternative").

tunities to perform constituent services that increase with seniority and encourage campaign contributions.[25]

> "Incumbent candidates, of course, can deliver more immediate legislative results than mere challengers. This fact enables them to raise much more money for the next campaign than their challengers, giving incumbents an enormous advantage in primary and general elections. They not only have more money; they have it much earlier, a factor that discourages many would-be challengers from even making the race. In 1986, an astounding ninety-eight percent of all House incumbents of both parties who ran for reelection were reelected. Equally astounding, over the past thirty years a weighted average of ninety percent of all House and Senate incumbents of both parties who ran for reelection were reelected, even at times when their own party lost control of the Presidency itself."

Lloyd N. Cutler, *Now Is the Time for All Good Men. . .*, 30 WM. & MARY L. REV. 387, 394-95 (1989) (footnote omitted).

Since World War II, the reelection advantages of congressional incumbents have expanded, and prolonged incumbency has burgeoned. In 1992, 88% of House incumbents and 82% of Senate incumbents who ran were reelected. See, *e.g.*, Frenzel, *Term Limits and the Immortal Congress*, BROOKINGS REV. 18, 21 (Spring 1992) (retired congressman cites overwhelming advantages of incumbency and need "to unrig a rigged system"); G. WILL, RESTORATION 73-89 (1992) (collecting data on sharp increase in congressional incumbency). What the voters who enacted Amendment 73 decided was simply

---

[25] See, *e.g.*, 39 U.S.C. §§ 3210, 3211, 3212 (franked mail, including "mass mailings"); 2 U.S.C. §§ 123b, 123b-1 (House and Senate recording studios); 2 U.S.C. § 58a (telecommunications services); 2 U.S.C. §§ 57, 58c (office expense allowances); 2 U.S.C. §§ 61-1, 332 (personal staffs); 2 U.S.C. § 72a (committee staffs); 2 U.S.C. §§ 43, 43b, 58 (travel allowances); 2 U.S.C. § 46b-1 (stationery); 2 U.S.C. §§ 57, 59 (offices in districts and home states). See also S. Res. 63, 103d Cong., 1st Sess. (1993) (authorizing U.S. Senate Counsel's representation of respondent Bumpers in this case, citing 2 U.S.C. § 288c(a)(1); see J.A. 89, 178).

not to continue to add the benefit of appearing on the printed ballot to the many other advantages multi-term incumbents already enjoy.[26]

The States have a well recognized interest in the fairness and openness of elections, and in encouraging "the potential fluidity of American political life." *Jenness* v. *Fortson*, 403 U.S. 431, 439 (1971). In advancing electoral objectives, they often distribute state benefits unequally among candidates. Many States have laws, of which the one in *Storer* is one example, designed to help major parties by discouraging "sore loser" or "spoiler" candidacies and "party raiding." *Burdick* v. *Takushi*, *supra*, 112 S. Ct. at 2066-67; *see also Rosario* v. *Rockefeller*, 410 U.S. 752, 761 (1973). Campaign finance laws now often restrict the contributions challengers are able to raise to increase their name recognition. *Cf. Buckley* v. *Valeo*, 424 U.S. 1 (1976) (upholding campaign-financing provisions of Federal Election Campaign Act). Certainly to try to limit the benefits some already governmentally advantaged candidates receive is not prohibited by the Constitution's listing of minimum qualifications for office in Article I.

2. *State Election Laws Often Unequally Favor Incumbents.*

The Arkansas plurality believed that by attempting to encourage challenges to incumbents, Amendment 73 ex-

---

[26] Eight other States by intiatives enacted restrictions on continued ballot access of long-time congressional incumbents. Ariz. Const., art. VII, § 18; Cal. Elec. Code § 25003; Fla. Const., art. 6, § 4; Mont. Const., art. IV, § 8; Neb. Const., art. XV, § 19; N.D. Cent. Code § 16.1-01-13.1; Wash. Rev. Code § 29.68; Wyo. Stat. § 22-5-104. Enforcement of the Washington statute has been enjoined by a district court, *Thorsted* v. *Gregoire*, *supra*, and the Nebraska provision after approval by 68% of the voters was held nevertheless invalid for insufficient signatures on the petition that put it on the ballot. *Duggan* v. *Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994). In addition, term limits for congressional incumbents have been adopted in six States. Colo. Const., art. XVIII, § 9; Mich. Const., art. 2, § 10; Mo. Const., art. III, § 45(a); Ohio Const., art. V, § 8; Ore. Const., art. II, § 20; S.D. Const., art. III, § 32.

ceeded "the general power of the states to regulate federal elections." P.C.A. 14a. But state laws affecting the conduct of congressional elections inevitably, and often designedly, influence results. Virtually any state election law—even determining the location of voting places, or how long the polls are open—will work to the advantage of some candidates over others. See *Burdick* v. *Takushi, supra,* 112 S. Ct. at 2063; *Anderson* v. *Celebrezze,* 460 U.S. 780, 788 (1983). Apart from congressional overruling, such laws are constrained not by Article I's minimum qualifications, but rather by the Fourteenth Amendment, which provides a check on arbitrary state regulations.

> "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."

Burdick v. *Takushi, supra,* 112 S. Ct. at 2063-64, *quoting Anderson* v. *Celebrezze,* 460 U.S. 780, 788 (1983). Thus in *Moore* v. *McCartney,* 425 U.S. 946 (1976), this Court held no substantial federal question was presented by an appeal challenging term limits for state officials under the Fourteenth Amendment.[27]

---

[27] Federal courts and state supreme courts, with the exception of the district court in *Thorsted* v. *Gregoire, supra,* have invariably sustained state laws that prescribe actual term limits against First and Fourteenth Amendment challenges—just as the Arkansas court did here with respect to Amendment 73's term limits on state officials. P.C.A. 20a, 27a, 42a. "[T]he mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.'" *Burdick* v. *Takushi,* 112 S. Ct. 2059, 2063 (1992), *quoting Bullock* v. *Carter,* 405 U.S. 134, 143 (1972). The highest courts of California, New York, and West Virginia have held that term limits have ample and compelling justification, and that they promote rather than impede the values the Fourteenth Amendment protects. They are neither arbitrary nor irrational, are content-neutral, and do not disable a protected class or disfavor particular beliefs.

> "Voters retain the ability to vote for any qualified candidate holding the beliefs or possessing the attributes they may

The Arkansas opinions did not explain why, if declining to continue to print the name of a multi-term incumbent on the ballot establishes a qualification like those in Article I, the same is not true also of Arkansas' (and forty-nine other States') many other laws that tightly restrict ballot access—such as Arkansas' law limiting places on the general-election ballot to party nominees unless sufficient voters petition, or its law prohibiting independent candidacies of primary losers.[28] It is difficult to imagine a state ballot law more outcome-determinative in general elections to Congress than the familiar laws that effectively restrict appearance on the ballot to primary winners.

In fact, this Court has held that state congressional election laws may take incumbency into account—by encouraging it. States may help incumbents by drawing congressional district lines so as to "avoid[] contests between incumbent Representatives." *Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983). They may "aim[] at maintaining

---

desire in a public officeholder. Under these circumstances, First Amendment protection of political expression and promotion of the marketplace for ideas continue unabated."

Legislature v. *Eu*, 54 Cal. 3d 492, 519, 816 P.2d 1309, 1325 (1991), *cert. denied*, 112 S. Ct. 1292 (1992); *accord*, *Roth* v. *Cuevas*, 82 N.Y.2d 791, 624 N.E.2d 689 (1993), *affirming* 158 Misc. 2d 238, 603 N.Y.S.2d 962 (1993); *State ex rel. Maloney* v. *McCartney*, 159 W. Va. 513, 517, 223 S.E.2d 607, 611, *appeal dismissed sub nom. Moore* v. *McCartney*, 425 U.S. 946 (1976). *Cf. also* U.S. Constitution, Twenty-second Amendment. About half the states limit the terms of governors. *Miyazawa* v. *City of Cincinnati*, 825 F. Supp. 816, 821 (S.D. Ohio 1993). See generally *Munro* v. *Socialist Workers Party*, 479 U.S. 189 (1986); *American Party* v. *White*, 415 U.S. 767 (1974); *Jenness* v. *Fortson*, 403 U.S. 431 (1971).

[28] Arkansas limits ballot access to nominees of an organized political party by primary or convention, unless by petition of 3% of the electors (Ark. Const., amend. 29, § 5; Ark. Code Ann. § 7-7-103); prohibits primary losers from running as independents (Ark. Code Ann. §§ 7-7-103(f), 7-8-101); requires fees and pledges of party loyalty for access to a primary-election ballot (Ark. Code Ann. § 7-7-301); prohibits certain groups from ballot access (Ark. Code Ann. § 7-3-108); and requires notice of intention to be a write-in candidate (Ark. Code Ann. § 7-5-205). See Appendix F, pp. 43a-53a, *infra*.

existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation may have achieved in the United States House of Representatives." *White* v. *Weiser*, 412 U.S. 783, 791 (1973).[29] The entire process of congressional redistricting—for which the States have primary responsibility, *Growe* v. *Emison*, 113 S. Ct. 1075, 1081 (1993)—is permeated with States' result-oriented decisions:

> "Politics and political considerations are inseparable from districting and apportionment. . . . District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences."

Gaffney v. *Cummings*, 412 U.S. 735, 753 (1973); see also *White* v. *Weiser*, *supra*, 412 U.S. at 795-96. This Court seldom has been persuaded that even the Fourteenth or Fifteenth Amendment requires overturning state districting laws that favor particular results, or even particular political parties. "The fact that district boundaries may have been drawn in a way that mimimizes the number of contests between present incumbents does not in and of itself establish invidiousness." *Burns* v. *Richardson*, 384 U.S. 73, 89 n.16 (1966). See also *Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1156 (1993) (racial-majority districting under Voting Rights Act); *Davis* v. *Bandemer*, 478 U.S. 109 (1986).

Arkansas' own congressional districts have been explicitly arranged to minimize disruption to incumbents. The court in *Doulin* v. *White*, 535 F. Supp. 450, 452

---

[29] Madison told the Convention that he expected state legislatures acting under Article I, § 4, "so to mould their regulations as to favor the candidates they wished to succeed." 2 FARRAND 241. As a counterbalance Congress was given "controuling power" to override them. *Id.*

(E.D. Ark. 1982), repeatedly cited *White* v. *Weiser*, *supra*, in stressing that the districts selected "would disrupt existing patterns of constituency-representative relationships far less than Plan A." See also *Turner* v. *Arkansas*, 784 F. Supp. 585, 588 (E.D. Ark. 1991) (districting in 1991 made "as few changes as possible" to *Doulin* plan). If Article I's minimum qualifications do not stand in the way of state primary laws that keep many categories of candidates off the ballot, and state districting laws that protect incumbency, surely they do not prevent the people of Arkansas from trying to enlarge the political process by a law that favors no group or political view, but encourages new participation.

III. STATE LIMITS ON TERMS IN CONGRESS WOULD NOT VIOLATE ARTICLE I.

Although the voters of Arkansas did not decide to enact term limits for members of Congress, they could constitutionally have done so. Nothing in the Constitution says otherwise; on the contrary, the Constitution confirms broad state power to regulate elections to Congress. Nor do the usual rules of constitutional construction suggest such a prohibition by implication. Moreover, laws enacted at the time of the adoption of the Constitution are "contemporaneous and weighty evidence of its true meaning." *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888). The contemporary practice confirms that the States may, consistently with Article I, set term limits for their representatives in Congress.

A. Contemporaneous Practice Emphatically Confirmed State Power.

1. *The States Have Enacted Additional Qualifications Since 1788.*

(a) *The Early Laws.*

As soon as they ratified the Constitution, the States began to pass laws regulating elections to the House of Representatives. And many of those laws imposed additional qualifications of many kinds for congressional office. Virginia, the largest and most populous State,

added both a land-ownership requirement and an additional residence requirement. It provided that the voters

> "shall assemble at their respective county courthouses on the second day in *February* next, and then and there vote for some discreet and proper person, *being a freeholder*, and who shall have been *a bona fide resident for twelve months within such district*, as [illegible] to the House of Representatives for the United States." [30]

Georgia allowed voting only for someone who "shall be a resident of three years standing in the district," North Carolina for one year in the district. Maryland and Massachusetts also required that candidates be residents of their respective districts. Delaware required voting for two candidates, at least one from a different county. New Jersey established a preliminary nominating process, and provided that "no Person whatever shall be set up as a Candidate on the said Day of Election, but the Persons so nominated and returned as aforesaid." Connecticut did the same. Tennessee, admitted in 1796, included in its election law for Members of Congress a requirement "That the person elected shall have been a citizen or resident of this State, three years next immediately preceding the day of election." Some of the States described these as regulations of times, places and manner.[31] In addition, Maryland specified residency locations for each senator, and Pennsylvania's congressional term-limits requirement continued in effect.[32] Congress never exercised

---

[30] Va. Act of Nov. 20, 1788, ch. 2, § II (second and third emphases supplied); see also Va. Act of Dec. 26, 1792, ch. 1, § II.

[31] Ga. Act of Jan. 23, 1789, p. 247; N.C. Act of Dec. 16, 1789, ch. 1, § I; Md. Act of Dec. 22, 1788, ch. 10, § VII; Mass. Res. of Nov. 19, 1788, ch. 49; Del. Act of Oct. 28, 1788; N.J. Act of Nov. 21, 1788, ch. 241, § 3; Conn. Res. of Oct. 9, 1788; Conn. Act of Jan. 1, 1789; Tenn. Act of Aug. 3, 1796, ch. 1, § 2. See Appendix C, pp. 8a-18a, *infra; cf. Quinn* v. *Millsap*, 491 U.S. 95 (1989) (property qualification for office violates Fourteenth Amendment).

[32] See nn. 4, 7, *supra*; Pa. Const., § 11 (1776) ("No man shall sit in congress longer than two years successively, nor be capable of reelection for three years afterwards").

its power under Article I, § 4, to override any such state laws.

The state election laws are an instance of "the contemporaneous practical exposition of the Constitution being too strong and obstinate to be shaken or controlled." *McPherson* v. *Blacker*, 146 U.S. 1, 27 (1892). "As this Court has stated from its first Due Process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2339 (1994); see also *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 412 (1928); *Stuart* v. *Laird*, 1 Cranch 299, 309 (1803) (early practice "an irresistible answer"). Here "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921); see also *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

(b) *The Current Laws.*

Over the years the subjects of state laws barring from congressional election have multiplied. Familiar examples are widespread state requirements that a candidate must be a registered voter—laws that thus sweep in all the various grounds for which States deny the franchise.[33] Among those grounds are conviction for felony or particular crime,[34] although some States simply deny election to felons outright.[35] Laws barring mental incompetents are similar.[36] A few States require residency in the

---

[33] *E.g.*, Nev. Const., art. 15, § 3; Miss. Const., art. 12, § 250; Appendix G, pp. 54a, 57a-67a, *infra*. Until the Nineteenth Amendment, this was the means by which most States prevented women from being candidates. For a summary of nineteenth-century state restrictions, see *Minor* v. *Happersett*, 21 Wall. 162, 172-73, 176-77 (1875).

[34] N.J. Stat. Ann. §§ 19:4-1, 19:13-8; Ala. Const., art. VIII, § 182; Ala. Code § 17-16-12; Appendix G, pp. 57a-65a, *infra*.

[35] *E.g.*, Ark. Code Ann. § 16-90-112(b); Ariz. Rev. Stat. Ann. § 13-904; N.H. Rev. Stat. Ann. § 607-A:2. Felons may constitutionally be disenfranchised. *Richardson* v. *Ramirez*, 418 U.S. 24 (1974).

[36] *E.g.*, Ariz. Rev. Stat. Ann. §§ 16-101, 16-311; N.D. Const., art. 2, § 2; N.D. Cent. Code § 44-01-01; Appendix G, pp. 65a-67a, *infra*.

congressional district;[37] some add requirements of specified time as a state resident[38] (often indirectly through requirements that candidates must be voters). There are numerous particular variations as well—for example, requirements of loyalty oaths, or bans on candidacy for two offices.[39] Arkansas disqualifies from seeking re-election any Senator appointed by the governor; it also bars from appointment as Senator the governor, lieutenant governor, and their relatives. Ark. Const., amend. 29, § 2.

State laws that deny ballot access except to persons who win a party nomination or secure a substantial number of petition signatures are nearly universal.[40] They are laws that this Court holds States have an "undoubted right to require." *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 194 (1986); *American Party* v. *White*, 415 U.S. 767 (1974); *Jenness* v. *Fortson*, 403 U.S. 431 (1971). Access to primary-election ballots is also tightly restricted, with requirements of time in the party, and disaffiliation from others. Primary-election losers are often then barred from the general election ballot, as by the California law this Court upheld in *Storer* v. *Brown*, and by Arkansas.[41]

---

[37] *E.g.*, Idaho Code § 34-1904; Nev. Rev. Stat. § 293.1755; Appendix G, pp. 54a-55a, *infra*.

[38] *E.g.*, Idaho Code §§ 34-604, 34-605; Colo. Rev. Stat. § 1-4-802; Appendix G, pp. 55a-57a, *infra*.

[39] *E.g.*, Pa. Stat. Ann., tit. 25, § 2938.1; Maine Rev. Stat. Ann., tit. 21-A, § 331(3); Appendix G, pp. 67a-69a, 86a-87a, *infra*.

[40] See, *e.g.*, Ark. Const., amend. 29, § 5; Ark. Code Ann. §§ 7-7-301 *et seq.*; Cal. Elec. Code §§ 6831, 6838; Ind. Code § 3-8-2-8; N.Y. Elec. Law § 6-142; Appendix G, pp. 74a-75a, *infra*; see also, *e.g.*, *Gardner* v. *Ray*, 154 Ky. 509, 157 S.W. 1147 (1913) (statute prescribing qualifications for party nomination is constitutional); *Secretary of State* v. *McGucken*, 244 Md. 70, 222 A.2d 693 (1966) (candidates required to appoint campaign treasurer).

[41] *E.g.*, Ark. Code Ann. § 7-7-103(f); Colo. Rev. Stat. § 1-4-105; Ill. Ann. Stat., ch. 10, § 5/10-2; Kan. Stat. Ann. § 25-202(c); Md. Ann. Code, art. 33, § 8-2; Neb. Rev. Stat. § 32-516; N.H. Rev. Stat. Ann. § 659:91-a; N.C. Gen. Stat. § 163-123(e); N.D. Cent. Code § 16.1-13-06; S.C. Code Ann. § 7-11-210; Tenn. Code Ann. § 2-5-101(f); see Appendix G, pp. 81a-85a, *infra*.

Some such "spoiler" laws even bar subsequent candidacy as write-ins.[42]

This Court has also upheld state laws that broadly forbid large groups of governmental officials and employees from running for Congress. See *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973); *cf. Clements* v. *Fashing*, 457 U.S. 957, 972 (1982) (automatic loss of state office upon becoming candidate for offices that included Congress). In those First and Fourteenth Amendment cases, the litigants did not even bother to assert that Article I could prevent such prohibitions of congressional candidacy, and this Court gave no hint of any such concern.[43] It is "settled doctrine" that "a public body may forbid its employees to run for elective office," and that such restrictions may apply to "policymaking officials." *Wilbur* v. *Mahan*, 3 F.3d 214, 219 (7th Cir. 1993) (Easterbrook, J., concurring); see also, *e.g.*, *Smith* v. *Ehrlich*, 430 F. Supp. 818 (D.D.C. 1976) (three-judge court) (private persons receiving government funds disqualified).[44]

---

[42] *E.g.*, Ga. Code Ann. § 21-2-133(d); Neb. Rev. Stat. § 32-516; N.C. Gen. Stat. § 163-123(e).

[43] The Oklahoma statute upheld in *Broadrick* provided that "No employee in the classified service shall be . . . a candidate for nomination or election to any paid public office . . . ." See 413 U.S. at 604 n.1. The Hatch Act forbids running as a candidate for "partisan political office." See 5 U.S.C. §§ 7322(1), 7323(a)(3). It was upheld in *U.S. Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), and *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947). See generally Appendix G, pp. 69a-74a, *infra*.

[44] A handful of state disqualification laws were held unconstitutional in decisions offering little analysis except the assertion that States could not add qualifications, and no attempt to deal with the many other instances in which States did. *E.g.*, *Danielson* v. *Fitzsimmons*, 232 Minn. 149, 44 N.W.2d 484 (1950) (felony disqualification); *Exon* v. *Tiemann*, 279 F. Supp. 609 (D. Neb. 1968) (district residency requirement); see pp. 46-47, *infra*. For a listing of the variety of state qualification laws as of 1889, see Brief of Petitioner in No. 93-1828, Appendix C.

2. *Congress Has Enacted Additional Disqualifications Since 1789.*

Congress itself has not hesitated to pass statutes that disqualify categories of individuals from public office. It began to do so in the very first session of the First Congress in 1789.[45] It did so again in 1790[46] and 1792 and 1793.[47] It continued thereafter regularly to enact laws that barred persons convicted of specified crimes from holding federal office.[48] Several of these disqualification laws, indeed, have applied only to members of Congress. *E.g.*, Act of July 16, 1862, ch. 180, 12 Stat. 577 (Member of Congress taking money for procuring government contracts); Act of June 11, 1864, ch. 119, 13 Stat. 123

---

[45] Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67 (Treasury official acting with conflict of interest "forever thereafter incapable of holding any office under the United States"). Seventeen of the Members of the First Congress, including Madison, had been delegates to the Constitutional Convention. *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984). They recognized that "the whole business of Legislation was a practical construction of the powers of the Legislature . . . ." 2 ANNALS OF CONG. 1960 (1791) (Gales & Seaton ed.) (Rep. Sedgwick); see also 1 *id.* at 514 (Rep. Madison). "[T]he First Congress was a sort of continuing constitutional convention." Currie, *The Constitution in Congress*, 61 U. CHI. L. REV. 775, 777 (1994). Its actions "have always been regarded . . . as of the greatest weight in the interpretation of that fundamental instrument." *Myers* v. *United States*, 272 U.S. 52, 174-75 (1926). See also *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983); *Carroll* v. *United States*, 267 U.S. 132, 150-53 (1925).

[46] Act of April 30, 1790, ch. 9, § 21, 1 Stat. 117 (bribery of judge). This provision reflects that the First Congress "did not understand impeachment to be the sole avenue for future disqualification of current officeholders." Currie, *supra* n.45, at 833 n.342.

[47] Act of May 8, 1792, ch. 37, § 12, 1 Stat. 281 (extending penalties of 1789 Act to other officials); Act of Dec. 31, 1792, ch. 1, § 26, 1 Stat. 298 (offenses by collectors and other officers), see 46 U.S.C. § 322; Act of Feb. 13, 1793, ch. 8, § 29, 1 Stat. 315 (same), see 46 U.S.C. § 59.

[48] See, *e.g.*, Act of Feb. 26, 1853, ch. 81, § 5, 10 Stat. 170; *id.*, § 6, 10 Stat. 171; Act of July 2, 1862, ch. 128, 12 Stat. 502; Act of July 17, 1862, ch. 195, §§ 1-3, 12 Stat. 589; Act of Feb. 25, 1865, ch. 52, §§ 1, 2, 13 Stat. 437, now 18 U.S.C. §§ 592, 593.

(Member of Congress accepting compensation when United States is a party); Act of March 3, 1911, ch. 231, § 144, 36 Stat. 1136, as amended, 18 U.S.C. § 204 (1988 ed.) (Member of Congress practicing in Claims Court). Noting such early federal legislation, Professor Corwin rejected "the dogmatic assertion that anybody who possesses the constitutionally stipulated qualifications of a President is under all circumstances qualified in the contemplation of the Constitution to be President." E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 33 (4th rev. ed. 1957). As was explained in *De Veau* v. *Braisted*, 363 U.S. 144, 159 (1960) (Frankfurter, J., announcing judgment),

> "Federal law has frequently and of old utilized this type of disqualification . . . . [A] large group of federal statutes disqualify persons 'from holding any office of honor, trust, or profit under the United States' because of their conviction of certain crimes, generally involving official misconduct. 18 U.S.C. §§ 202, 205, 206, 207, 216, 281, 282, 592, 1901, 2071, 2381 [1958 ed.]. For other examples in the federal statutes see 18 U.S.C. § 2387; 5 U.S.C. § 2282; 8 U.S.C. § 1481 [1958 ed.]."

Several such provisions are in the current *United States Code*.[49]

---

[49] They include 18 U.S.C. § 201(b)(4) (witness seeking or accepting bribe); 18 U.S.C. § 592 (keeping troops at polls); 18 U.S.C. § 593 (member of armed forces who interferes with elections); 18 U.S.C. § 1901 (revenue officer who trades in public property); 18 U.S.C. § 2071(b) (custodian who destroys public records); 18 U.S.C. § 2381 (treason); 18 U.S.C. § 2383 (rebellion or insurrection); 5 U.S.C. § 7311 (striking against the government or advocating its overthrow); 5 U.S.C. § 7313 (felony riot or disorder); 46 U.S.C. §§ 59, 322 (willful neglect by maritime officers). Until recent amendments, several other crimes also were punished by disqualification from office. See, *e.g.*, 18 U.S.C. §§ 203(a), 204 (1988 ed); see also Federal Election Campaign Act Amendments, Act of Oct. 15, 1974, § 407, 88 Stat. 1263, 1290 (reporting-requirement violator "shall be disqualified from becoming a candidate in any future election for Federal office" for a stated period; repealed by Act of May 11, 1976, §§ 111, 114, 90 Stat. 475, 486, 495, but with proviso

B. No Prohibition on Added State Qualifications Is Implied in the Constitution.

1. *Withdrawals of State Power Are Rarely Implied.*

The Arkansas court's holding that an unstated negative implication of Article I bars Amendment 73 reopens a very old question: when, if ever, will silence of the Constitution be held nevertheless to prohibit state power? "The principles which the Court has followed in construing state power were stated by Alexander Hamilton in Number 32 of The Federalist." *Goldstein* v. *California*, 412 U.S. 546, 552 (1973):

> "[A]s the plan of the [Constitutional] convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*."

Id. at 552-53, *quoting* THE FEDERALIST No. 32 at 200 (emphasis and bracketed text in original). This Court through Chief Justice Marshall early explained that prohibitions on state power to legislate are not to be implied when the Constitution does not state them:

> "[I]t was neither necessary nor proper to define the powers retained by the states. These powers proceed,

---

that repeal did not affect penalties already imposed). See generally Appendix E, pp. 25a-42a, *infra*. A dictum in *Burton* v. *United States*, 202 U.S. 344, 369-70 (1906), suggested that state legislatures' authority was so great that Senators did not even hold office under the government of the United States; so extreme a view would be inconsistent with a host of other decisions, *e.g.*, *United States* v. *Classic*, *supra*, 313 U.S. at 315; *Smiley* v. *Holm*, *supra*, 285 U.S. at 366-67.

> not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument."

Sturges v. *Crowninshield*, 4 Wheat. 122, 193 (1819) (state insolvency laws not supplanted by federal bankruptcy power); see also *Houston* v. *Moore*, 5 Wheat. 1 (1820) (states may discipline militia in federal service).[50] As Chief Justice Marshall also explained, when the Framers intended to withdraw a power from the States, they knew how to say so unambiguously. *E.g.*, Article I, § 10. When the Constitution has prohibitions,

> "The question of their application to states is not left to construction. It is averred in positive words."

Barron v. *Baltimore*, 7 Pet. 243, 249 (1833).[51] Concurrent state power is the usual expectation. *Cf. Tafflin* v. *Levitt*, *supra*, 493 U.S. at 458.

Only in a very few instances has this Court cautiously been willing to imply from constitutional silence a limitation on state legislative power. Most celebrated is the "audacious"[52] doctrine of the "dormant" Commerce

---

[50] See also *McCulloch* v. *Maryland*, 4 Wheat. 316, 435 (1819), holding that "the power of taxation in the general and state governments is acknowledged to be concurrent," but that the Supremacy Clause of Article VI prevents states from taxing an instrumentality of the federal government.

[51] Thomas Jefferson, whose political views on other issues were often unlike Marshall's, reasoned the same way. Letter to Joseph C. Cabell, Jan. 31, 1814, in 11 WORKS OF THOMAS JEFFERSON 381 (P. Ford ed. 1905). *Accord*, *Golden* v. *Prince*, 10 Fed. Cas. 542, 543 (C.C.D. Pa. 1814) (No. 5,509) (Justice Washington on circuit).

[52] F. FRANKFURTER, THE COMMERCE CLAUSE 19 (1937) (observing that such an implied prohibition "would hardly have been publicly avowed in support of adoption of the Constitution"). *Cf. Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 239 n.2 (1985) (Eleventh Amendment): "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." Margins in several state ratifying conventions were

Clause. *Cooley* v. *Board of Wardens*, 12 How. 299 (1852), after reaffirming THE FEDERALIST No. 32, held that States were excluded from regulating those aspects of interstate commerce that "are in their nature national, or admit only of one uniform system, or plan of regulation." 12 How. at 318-19. Such a negative implication in the Commerce Clause was in many respects unique, and it reflected that a leading reason the Philadelphia Convention had assembled was to bring an end to interstate trade wars; otherwise, as Justice Jackson wrote for the Court, "the states were quite content with their several and diverse controls over most matters." *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 534 (1949). And even the "dormant" Commerce Clause leaves substantial range for state legislation. See, *e.g.*, *Barclays Bank PLC* v. *Franchise Tax Board*, 114 S. Ct. 2268 (1994); *California* v. *Thompson*, 313 U.S. 109, 113 (1941).

Generally, the Constitution expects Congress, rather than some implied negative prohibition, to protect federal interests against the States. *E.g.*, *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 479 (1974); *accord, Goldstein* v. *California, supra*, 412 U.S. at 571. And here, unlike provisions such as the Commerce Clause that never mention the States, Article I actually specifies in § 4 that, unless Congress supersedes, the States are to regulate the election of their representatives in Congress. If States abuse their power, as Hamilton recognized, Article I specifically assigns the solution to Congress. THE FEDERALIST No. 59 at 399.

Yet glaringly absent in this case is any action by Congress with respect to Amendment 73—even though

---

close; *e.g.*, Massachusetts (187-168); New York (30-27); Virginia (89-79). See 2 ELLIOT 181, 413; 3 *id.* 654. See also *Tyler Pipe Industries, Inc.* v. *Washington State Dep't*, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part) (questioning doctrine of "dormant" Commerce Clause). A constitutional prohibition of a state law with "great potential for disruption or embarrassment" of foreign affairs was implied in *Zschernig* v. *Miller*, 389 U.S. 429, 435 (1968).

it is Congress and its Members who presumably are directly affected. With ample and explicit constitutional authority for Congress to protect any federal interest, there is all the less reason to ask this Court to displace the role assigned Congress, and stretch to imply an unstated constitutional prohibition on state laws. The fact that Congress has not chosen to restrict such state laws "is . . . evidence that the preeminent speaker decided to yield the floor to others." *Barclays Bank PLC* v. *Franchise Tax Bd., supra,* 114 S. Ct. at 2285.

2. *Amendment 73 Does Not Affect Article I's Disqualifications.*

The purpose of requiring minimum age, inhabitancy and citizenship was to ensure that Representatives were mature, familiar with the States they represent, and adequately attached to the United States. See, *e.g.,* 1 FARRAND 375 (Mason); 2 *id.* 216-17 (Mason); 2 *id.* 268 (Gerry). None of those objectives is compromised in the slightest by Amendment 73, which does not contradict or seek to alter any of the disqualifications in Article I. Amendment 73 does not even deal with age, citizenship or inhabitancy. Even if Article I were read to withdraw all state legislative power on those three subjects, that would not mean that it invalidated state qualifications as to matters like long incumbency that Article I does not address at all.[53]

It is difficult to conceive how the decision of the people of a State ahead of time not to return persons to Congress as their representative after many years of incumbency is any more a threat to the constitutional structure than if the people decide in a particular election not to re-elect a particular individual. Obviously the Framers did not believe it essential that all Members of Congress have sit for identical tenures, and of course Members

---

[53] Nor does Amendment 73 attempt to diminish the authority of each House under Article I, § 5, to judge its members' "Qualifications." By *Powell* v. *McCormack*, 395 U.S. 486 (1969), the latter term refers only to those listed in the Constitution itself. See p. 44, *infra*.

never have. The voters of Arkansas are regulating their own procedure for choosing representatives, no one else's. They are not threatening to alter the federal system. They are simply trying, by offsetting some of the advantages conferred on incumbents, to affect the character of representation the people of their State receive.

3. *Citizenship and Residency Were Determined by State Laws.*

The plurality of the Arkansas Supreme Court nevertheless believed that "if there is one watchword for representation of the various States in Congress, it is uniformity. . . . Piecemeal restrictions by State would fly in the face of that order." P.C.A. 14a. A concurring justice thought that "the specter of the hodge-podge of qualifications which a contrary holding might engender is daunting enough to swing the balance." P.C.A. 41a.

But the Framers did not expect uniformity.[54] They began by leaving voter qualifications for the House entirely up to the States, subject to the authority of Congress to enact laws requiring more uniformity.[55] That provision "was intended to avoid the consequences of declaring a single standard for exercise of the franchise in federal elections." *Tashjian* v. *Republican Party*, 479 U.S. 208, 227 (1986). And two of the three minimum requirements in Article I, §§ 2 and 3—citizenship and inhabitancy—at the time the Constitution was adopted depended entirely on State law.[56]

---

[54] Hamilton expected a "material diversity" reflecting "diversity in the state of property, in the genius, manners, and habits of the people of the different parts of the union." THE FEDERALIST No. 60 at 404.

[55] James Madison explained in the Virginia convention that uniformity would be a responsibility of Congress, and that the states were "best acquainted with the situation of the people, subject to the controul of the general government, in order to enable it to produce uniformity, and prevent its own dissolution." 3 FARRAND 311-12.

[56] No federal definition of United States citizenship was established until the Fourteenth Amendment in 1868. The first proposed

When the Constitution demands uniformity, it generally says so—as in the authorization for a national bankruptcy law and naturalization law, and the requirement that State ports be treated equally. Art. I, § 8, cl. 4; Art. I, § 9, cl. 6. No such requirement is to be found in Article I, § 2 or § 3. If anything, by specifically authorizing state laws both in § 2 and § 4, Article I leaves the strong inference that in this area uniformity was not expected.

4. *Other "Qualification" Clauses Do Not Impliedly Bar State Laws.*

"[T]he Constitution's terms are illuminated by their cognate provisions." *Freytag* v. *Commissioner*, 111 S. Ct. 2631, 2644 (1991); see *Buckley* v. *Valeo*, *supra*, 424 U.S. at 124. No negative implication barring additions has been read into other "qualification" provisions of the Constitution:

—Article I, § 2, cl. 1, explicitly establishes the qualifications of voters for the House as those each State sets for the most numerous branch of its legislature. Yet the States are not prohibited by that provision or the Seventeenth Amendment from adopting voter qualifications for federal elections that are not identical to those for state elections. *Tashjian* v. *Republican Party*, 479 U.S. 208, 229 (1986).

—Also in spite of the voter qualifications established in Article I, § 2, Congress under Article I, § 4, may set a different age from what the States adopted. *Oregon* v.

---

naturalization law had a clause requiring one year of residency for citizenship; a congressman argued that Article I "had expressly said how long they should reside among us before they were admitted to seats in the Legislature; the propriety of annexing any additional qualifications is therefore much to be questioned." 1 ANNALS OF CONG. 1149 (1790) (Rep. Lawrence). But James Madison responded that "there is no doubt we may, and ought to require residence as an essential." *Id.* at 1150. Concern was expressed by all, however, as to whether the federal legislation would interfere with powers reserved to the States, and the provision was dropped. *Id.* at 1149-64.

Mitchell, 400 U.S. 112, 117-18 (1970) (Black, J., announcing judgment).

—Just as Article I disqualifies certain persons from serving in Congress, so Article II, § 1, cl. 2, disqualifies certain persons—Senators, Representatives, and others holding federal office—from being Presidential electors. Yet from the beginning, some states in addition required residency within a district, or even a county, for Presidential electors,[57] and two added landed property requirements.[58] This Court unhesitatingly upheld the States' authority to require election by district in *McPherson* v. *Blacker*, 146 U.S. 1, 27-35 (1892). Restrictions on state power to choose Presidential electors, this Court has held, must be found in the Fourteenth Amendment and similar provisions. *Williams* v. *Rhodes*, 393 U.S. 23, 29 (1968).

C. State Power Was Not Questioned When the Constitution Was Adopted.

1. *The Constitutional Convention.*

From the surviving records of Philadelphia, these points are clear:

(1) The Framers deleted a provision to make the qualifications in Article I exclusive.

(2) The Framers declined to add to the Constitution either

(a) a national requirement of property ownership or financial standing, or

(b) a national test for citizenship, or

(c) national term limits.

---

[57] Mass. Res. of Nov. 19, 1788 (district residency); Va. Act of Nov. 17, 1788 (same); Del. Act of Oct. 28, 1788 (county residency). Several states included requirements of state residency. N.H. Act of Nov. 12, 1788; N.J. Act of Nov. 21, 1788; Pa. Act of Oct. 4, 1788. Maryland required that five Presidential electors be from the Western Shore, and three from the Eastern Shore. Md. Act of Dec. 22, 1788. See Appendix D, pp. 19a-24a, *infra*.

[58] N.J. Act of Nov. 21, 1788, § 8; Va. Act of Nov. 17, 1788.

(3) Some of the delegates expressed the belief that *Congress* would not be able to add qualifications for its own members; but neither they nor any other delegate ever questioned the power of the *States* to do so.

1. Bearing directly on the present case was a change made in the wording of what became Article I, § 2. The provision was drafted in the Committee of Detail, which wrote most of the Constitution. As reflected in the notes of Edmond Randolph, one of the Committee members, the provision originally read:

> "5. The qualifications of (a) delegates shall be the age of twenty five years at least, and citizenship: (*and any person possessing these qualifications may be elected except*)"

2 FARRAND 139 (second emphasis supplied). If that language, or language like it, had been adopted, the Constitution would be a different document, and its listed disqualifications would exclude any others. But that language was *not* adopted. The exclusivity clause was *deleted* by the Committee. *See id.* at 178, 137 n.6. Thus the Framers rejected the very provision that the Arkansas court implied and added to the Constitution.[59]

2. So distrustful were some delegates of long incumbency that they briefly considered adopting a national term limits requirement in 1787, then dropped it as "entering too much into detail for general propositions." 1 FARRAND 50-51; see also *id.* 20, 210, 217. A version of such a provision had been part of the Articles of Confed-

---

[59] Later, in the last draft, the Committee of Style changed the phrasing to the negative ("No person shall . . .") of the final version. The negative phrasing appears further confirmation that the provisions were simply setting minimums. This Court in *Powell* v. *McCormack*, *supra*, concluded that the Committee of Style had not intended to make a change of substance. 395 U.S. at 538-39. The negative wording did reflect, however, the earlier change of substance that had occurred when the Committee of Detail (which was charged with substantive aspects) had deleted the clause that would have made Article I, § 2's qualifications exclusive. The negative phrasing confirmed that decision.

eration,[60] and several States added limitations of their own. In the end the Framers put their trust in the frequent elections for the House which they adopted, concluding that a national constitutional requirement of "rotation" would not be necessary. 1 FARRAND 210, 217. Madison opposed a national requirement, and expressed confidence that "new members . . . would always form a large proportion" of the House of Representatives. 1 FARRAND 361. For most of this country's history, that faith of the Framers proved essentially correct. More recently it has not.

3. Although the Convention's discussion of proposed national term limits was brief, consideration of proposals that the Constitution require property ownership or disqualify debtors, or that Congress be specifically authorized to do so, was more extended. At no time did this discussion address state power to set qualifications. Rather, there was concern that national rules on those subjects would be too sweeping, and could not adequately reflect local conditions. 2 FARRAND 121, 122, 126. When it was proposed that Congress be authorized to enact property requirements, some delegates saw danger in allowing *the Congress,* with its inherent conflict of interest, to add qualifications that might be designed to benefit its incumbents. Madison worried, for example, about "vesting an improper & dangerous power in the [federal] Legislature," and others expressed concern that if Congress were "composed of any particular description of men, of lawyers for example, . . . the future elections might be secured to their own body." 2 FARRAND 250. In that context Madison urged that

> "The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the [federal] Legislature could regulate those of either, it can by degrees subvert the Constitution."

---

[60] Articles of Confed., Art. V, provided for delegates to Congress to serve not more than "three years in any term of six years." Several states imposed additional limits. See nn. 7, 17, *supra*; see also Brief of Petitioner in No. 93-1828, Appendix B.

2 FARRAND 249-250 (emphasis supplied). As this Court has pointed out, "Madison's argument was not aimed at the imposition of a property qualification as such, but rather at the *delegation to the Congress* of the discretionary power to establish any qualifications." *Powell* v. *McCormack, supra*, 395 U.S. at 534 (emphasis supplied). When the handful of disqualifications in Article I was adopted, no one said they were exclusive, much less put such a proposition to a vote.

4. The delegates at all times recognized that the requirement of citizenship simply left the standard up to the varying laws of the States, subject to whatever naturalization laws Congress might enact. Hamilton argued for requiring "merely Citizenship & inhabitancy," arguing that "[t]he right of determining the rule of naturalization will then leave a discretion to the Legislature on this subject." 2 FARRAND 268. Madison agreed. *Id.*

5. There were several comments that the list of disqualifications should not be too long or detailed, lest it be misconstrued as having prevented further legislative action on the subject.

> "Mr. Elseworth was for disagreeing to the remainder of the clause disqualifying public debtors; *and for leaving to the wisdom of the Legislature* and the virtue of the Citizens, the task of providing agst. such evils."

2 FARRAND 126 (emphasis supplied). John Dickinson "was agst. any recital of qualifications in the Constitution" because "[i]t was impossible to make a compleat one;" he worried that someone might argue that "a partial one would by implication tie up the hands of the Legislature from supplying the omissions." *Id.* 123. And James Wilson's objection to a specific provision authorizing Congress to set property qualifications was that "this particular power would constructively exclude every other power of regulating qualifications." *Id.* 251.

Thus in the surviving records of the drafting and ratification of the Constitution, although some delegates may

have doubted the power of *Congress*, there was not a single person who questioned the authority of the *States* to continue to set qualifications for their representatives to the national legislature. In fact, language to make the disqualifications in Article I exclusive was deleted.

2. *The Ratifying Conventions and* The Federalist.

What is striking in the state ratifying conventions is that the power granted Congress in Article I, § 4, was extremely controversial; the power of the States was not. Although opponents of the Constitution were quick to complain of every perceived limitation on state power, none suggested that the States were being denied the power to set qualifications for their representatives in Congress. The objections were to the breadth of the power in Article I, § 4, which it was feared the Congress would use to pass laws stripping the States of their control of elections to Congress. See p. 10, *supra*. *The Federalist* responded that the congressional power was essential to override what the States might do. See THE FEDERALIST No. 59 at 399, 402-03 (Hamilton). More generally, in *The Federalist* No. 32, quoted by Chief Justice Marshall and many times since, see pp. 32-34, *supra*, Hamilton reassured that unstated restrictions on state power would not be implied. With respect to congressional elections in particular, Madison assured that

> "The election of the President and Senate, will depend in all cases, on the Legislatures of the several States. And the election of the House of Representatives, will equally depend on the same authority in the first instance; and will probably, for ever be conducted by the officers and according to the laws of the States."

Id. No. 44 at 307. Hamilton reiterated that the Framers "have submitted the regulation of elections for the Fœderal Government, in the first instance, to the local administrations." *Id.* No. 59 at 399.[61]

---

[61] "The new Constitution gives the people a fair opportunity to elect their Representatives for the general legislature. The state legislatures are to make the regulations and arrangements for the

When critics said Congress would too much favor the wealthy, Hamilton and Madison responded that *the Constitution* imposed minimal tests for membership and did not require any property qualifications, either for voters or members. Hamilton also believed that *Congress* would not be able to add qualifications:

> "The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property *either for those who may elect or be elected.* But this forms no part of the power to be conferred *upon the national government.* Its authority would be expressly restricted to the regulation of the *times,* the *places,* and the *manner* of elections. The qualifications *of the persons who may choose or be chosen,* as has been remarked upon another occasion, are defined and fixed in the constitution, and are unalterable by the [federal] legislature."

Id. No. 60 at 408-09 (some emphases supplied). Madison had said much the same thing at the Convention, opposing the proposal to empower *Congress* to set property qualifications:

> "The qualifications *of electors and elected* were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the [federal] Legislature could regulate those of either, it can by degrees subvert the Constitution."

2 FARRAND 249-50 (emphasis supplied).

By their own terms, these comments on the powers of Congress could not have been denying state power. For in each instance when Madison and Hamilton referred to qualifications being "fixed" by the Constitution, they referred in the very same sentence to qualifications of *voters* (electors) as well as of members of Congress: "qualifications of electors and elected" in Madison's words;

---

choice; and to make the privilege still more secure, these regulations are subject to the revision of the general legislature." *The Republican,* Jan. 7, 1788, in 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 530 (M. Jensen ed. 1978).

"qualifications of the persons who may choose or be chosen" in Hamilton's. Yet there was never any doubt that Article I, § 2, cl. 1, left the qualifications of *voters* entirely up to the legislature of each State (as long as they matched what the State set for voters for its lower house). Such qualifications were "fixed" by the Constitution only in the sense that *Congress* could not change them. Thus, "fixed" as used by Madison and Hamilton could not possibly have meant beyond the power of the state legislatures: otherwise the quoted statements, because they referred to voters as well as to representatives, would have made no sense.[62]

D. This Court's Prior Decisions Recognize Legislative Power To Add Disqualifications.

In *Powell* v. *McCormack*, 395 U.S. 486 (1969), this Court interpreted the meaning of the word "Qualifications" in Article I, § 5, which provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."[63] This Court held that when a single House of the Congress was thus sitting in a quasi-judicial role pursuant to Article I, § 5, to "Judge" the qualifications of its members, then the only "Qualifications" that § 5 authorized it to apply were those specified in the Constitution, and not others that it might wish to add for the occasion. *Cf.* also *INS* v. *Chadha*, 462 U.S. 919 (1983) (single House may not exercise the lawmaking power of Congress).

Powell considered the authority of one House to exclude a person elected by the people of a State; not whether Article I excludes additional restrictions on being elected. This Court in *Powell* did not hold that the disqualifications in Article I, §§ 2 and 3, could not be added to by legislation, by the States or even by Congress. On

---

[62] The same use of "fixed" occurs in Wilson Nicholas' explanation in the Virginia ratifying convention. 3 ELLIOT 8.

[63] "We held that, in light of the three requirements specified in the Constitution, the word 'qualifications'—of which the House was to be the Judge—was of a precise, limited nature." *Nixon* v. *United States*, 113 S. Ct. 732, 740 (1993).

the contrary, the opinion noted that although "petitioners argue that the proceedings [of the Constitutional Convention] manifest the Framers' unequivocal intention to deny *either branch of Congress* the authority to add to or otherwise vary the membership qualifications expressly set forth in the Constitution," nevertheless

> "We do not completely agree, for the debates are subject to other interpretations."

395 U.S. at 532 (emphasis supplied).[64] And, far from addressing the power of the States to regulate the qualifications for Congress, the *Powell* opinion specifically put that issue aside: it pointed out that it was not deciding "the more narrow issue of the power of the States." 395 U.S. at 543.

That *Powell* did not reach beyond Art. I, § 5, was subsequently confirmed in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). There this Court reiterated that Article I, "Section 5 confers . . . not a general legislative power upon the Congress, but rather a power 'judicial in character' upon each House of the Congress." 424 U.S. at 133. Far from suggesting that the minimum qualifications in the Constitution were exclusive, this Court in *Buckley* observed that under Article I, § 4, even *Congress* might add to them:

> "Whatever *power Congress may have to legislate*, such qualifications must derive from § 4, rather than § 5, of Art. I."

Id. (emphasis supplied). When Congress legislates a disqualification, of course, it interferes with the right of the people of the States under Article I and the Seventeenth Amendment to choose their own representatives. A

---

[64] This Court went on to hold that the argument was acceptable only "in the context . . . of the distinction the Framers made between the power to expel and the power to exclude," *i.e.*, only as a construction of Article I, § 5. 395 U.S. at 532. The opinion emphasized that if each House's power to exclude, exercised by majority vote, were not limited by this fixed standard, it would effectively supplant the limitation on the power to expel, Art. I, § 5, cl. 2, which requires a two-thirds vote. 395 U.S. at 536.

disqualification enacted by the people of the State themselves, however, does not—and can be overridden by Congress under Article I, § 4.[65]

E. Other Sources Are Inconclusive.

1. *House and Senate Seating Votes.*

Occasionally members of the House and Senate in judging election contests under Article I, § 5, debated whether to honor state qualification laws. This Court in *Powell* v. *McCormack* held that "we are not inclined to give [Congress'] precedents controlling weight." 395 U.S. at 547. The constitutional position taken by members, which sometimes changed, sometimes corresponded to their immediate political interests. See Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 261 (1941). This Court observed that "congressional practice has been erratic" and cautioned that even "[h]ad these congressional exclusion precedents been more consistent, their precedential value still would be quite limited." 395 U.S. at 545-46 (footnote omitted).[66]

2. *Old Cases.*

Some old cases from other courts have commented, often in dicta, that the disqualifications in Article I pre-

---

[65] In drafting the first clause of Article I, § 2, the originally proposed word "elected" was eliminated, in favor of the broader term "chosen . . . by the People." See 2 FARRAND 129, 178. The Seventeenth Amendment was not intended to narrow this scope. *Cf. Newberry* v. *United States*, 256 U.S. 232, 250 (1921). Here it was "the People" of the State who exercised their constitutionally assigned choice when they adopted Amendment 73. They could also repeal it at any time. Ark. Const., amend. 7.

[66] In one early dispute, cited by the Arkansas plurality, P.C.A. 13a, a House committee recommended not to honor Maryland's added requirement of district residency. However, the full House rejected the committee's report and declined to decide that the Maryland law was unconstitutional. See M. CLARKE & D. HALL, CASES OF CONTESTED ELECTIONS IN CONGRESS 167, 169-71 (1834). Representative Randolph argued that "the Constitution merely enumerated a few *disqualifications* within which the States were left to set." 17 ANNALS OF CONG. 883 (1807) (emphasis in original).

cluded the States from adding others. Several of these opinions, invalidating state prohibitions on officials running for Congress, were effectively disapproved by this Court's decision in *Clements* v. *Fashing, supra.*[67] Others simply provided no reasoning or simply cited Justice Joseph Story's treatise or, in more recent years, misread *Powell's* Article I, § 5, holding as a bar to state laws.[68] None considered the actual state and congressional practice going back to 1788 and 1789. There were also decisions holding state qualification laws valid.[69]

3. ***Commentators.***

1. The first prominent writer on the Constitution expressed the view that the States had ample power to enact requirements such as property ownership and district residency. Judge St. George Tucker noted Virginia's requirement of freehold ownership and district residency as "a wise provision and perfectly consonant with the principles of representation." 1 ST. G. TUCKER, BLACKSTONE'S COMMENTARIES App. 197 (1803). He worried, however, that the law might be ineffective if the voters of a district chose to ignore those qualifications, and then the House under Article I, § 5, decided to ignore the state law and seat the winner.[70]

---

[67] *E.g., State ex rel. Wettengel* v. *Zimmerman*, 249 Wis. 237, 24 N.W.2d 504 (1946). After *Clements* an Article I attack on such a law was rejected in *Joyner* v. *Mofford, supra.*

[68] *E.g., Danielson* v. *Fitzsimmons, supra*; *Stack* v. *Adams*, 315 F. Supp. 1295 (N.D. Fla. 1970).

[69] *E.g., Adams* v. *Supreme Court*, 502 F. Supp. 1282, 1291 (M.D. Pa. 1980); *Williams* v. *Tucker*, 382 F. Supp. 381, 388 (M.D. Pa. 1974) (three-judge court); *Oklahoma State Election Bd.* v. *Coats*, 610 P.2d 776, 780 (Okla. 1980); see also n. 40, *supra.*

[70] See 1 ST. G. TUCKER, *supra*, at App. 213. They "may be rendered nugatory, by the constitution which imposes no such condition, and which makes each house the judge of the qualifications, as well as of the elections and returns of its own members," "should any man possess a sufficient interest in a district in which he neither resides nor is a freeholder, to obtain a majority of the suffrages in his favor." 1 *id.* at App. 197, 213. The apprehension was not unfounded, even for the disqualifications of Article I, § 3. See 16 ANNALS OF CONG. 24 (1806) (Senate seating of Henry Clay

2. In the same era Thomas Jefferson reflected that, although it remained one of the "doubtful questions on which honest man may differ,"

> "Had the constitution been silent, nobody can doubt but that the right to prescribe all the qualifications and disqualifications of those they would send to represent them, would have belonged to the State. So also the constitution might have prescribed the whole, and excluded all others. It seems to have preferred the middle way. It has exercised the power in part, by declaring some disqualifications, to wit, those of not being twenty-five years of age, of not having been a citizen seven years, and of not being an inhabitant of the State at the time of election. But it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the State." [71]

3. Justice Joseph Story in 1833 argued in his treatise, exactly contrary to Jefferson, that "the affirmation of these qualifications would seem to imply a negative of all others." 2 J. STORY, COMMENTARIES § 624 (1833). He acknowledged the state laws that required district residency or property ownership, but argued that if these were allowed "they may impose any other qualifications . . . however inconvenient, restrictive, or even mischievous," hypothesizing in particular state religious tests for office. 2 *id.* at § 623.[72] He did not mention the override

---

when 29 years old). The House ignored state laws on other occasions. See *Powell* v. *McCormack*, *supra*, 395 U.S. at 543 n.79.

[71] Letter to Joseph C. Cabell, Jan. 31, 1814, in 11 WORKS OF THOMAS JEFFERSON 380 (P. Ford ed. 1905).

[72] Justice Story further argued that the States could not add qualifications for a Representative because he said they could not do

power of Congress in Article I, § 4, nor the specific prohibition of religious tests in Article VI. He also warned that a State might set qualifications so high that no one could meet them, thereby dissolving the Union. *Id.*[73]

4. For years most commentators paid little attention to the issue, simply relying on Story's argument.[74] More recently, however, Professor Zechariah Chafee rejected Story's theory of exclusivity as one of two "extreme views" that did not reflect the fact that "Congress has rather cautiously imposed some additional tests by statute," and "[m]ost of the exclusions from Congress before 1919 were for offenses which had been expressly made a disqualification by Act of Congress."[75]

* * *

---

so for the President, and "[e]ach is an officer of the Union." 2 J. STORY, *supra*, at § 626. That the people of a single State might not erect qualifications for an office representing people of all the States, however, says nothing about their setting qualifications for officers who represent their own State in Congress. Moreover, although the Constitution again is silent, States added qualifications for their Presidential electors. See pp. 37-38, *supra*.

[73] Although influential, Justice Story was hardly infallible, and sometimes he was famously wrong. In *Swift* v. *Tyson*, 16 Pet. 1 (1842), he assured "we have not now the slightest difficulty in holding" what was the "true intendment and construction" of the first Judiciary Act. 16 Pet. at 19. His conclusion prevailed for nearly a century, until *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). Justice Holmes, joined by Justices Brandeis and Stone, had earlier concluded that "Mr. Justice Story probably was wrong if anyone is interested to inquire what the framers of the instrument meant," and "in my opinion the prevailing doctrine has been accepted upon a subtle fallacy that never has been analyzed." *Black & White Taxicab & Transfer Co. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-33, 535 (1928) (dissenting opinion). See also *Mayor of New York* v. *Miln*, 11 Pet. 102, 158 (1837) (Story, J., dissenting, urging that grant of commerce power to Congress "leaves no residuum" for the States).

[74] *Compare* 1 J. KENT, COMMENTARIES ON AMERICAN LAW 214 (1826) (simply citing Article I disqualifications) *with* 1 *id.* 228 n.a (3d ed. 1836) (adding footnote adopting Story view).

[75] Z. CHAFEE, *supra*, at 257, 262-63 (footnote omitted). Chafee observed that "causes of exclusion must be established by law,

Whether the voters of Arkansas were wise in enacting their ballot limitation, no one at this point can say with certainty. Petitioners believe that they were; some other serious Americans believe that laws discouraging long incumbency in Congress are a bad idea. Congress may superimpose its own judgment on the matter at any time.

What is certain is that if this Court reads an unstated prohibition of this law into Article I, the opportunity for experiment will end—along with who can say how many other state regulations of congressional elections.

> "Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . . . This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles."

New State Ice Co. v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). "Our view of the wisdom of a state constitutional provision may not color our task of constitutional adjudication." *Clements* v. *Fashing*, *supra*, 457 U.S. at 973. And Justice Holmes cautioned against

> "prevent[ing] the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."

Truax v. *Corrigan*, 257 U.S. 312, 344 (1921) (dissenting opinion).

CONCLUSION

For the reasons stated, the judgment should be reversed.

---

and that the resolution of one house of Congress cannot make law." *Id.* at 262 (footnote omitted). *Cf. INS* v. *Chadha*, *supra*; *Powell* v. *McCormack*, *supra*.

Respectfully submitted,

JOHN G. KESTER *
TERRENCE O'DONNELL
TIMOTHY D. ZICK
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5069
Attorneys for Petitioners U.S. Term Limits, Inc., et al.

Of Counsel:
H. WILLIAM ALLEN
ALLEN LAW FIRM
212 Center Street
Little Rock, Arkansas 72201

* Counsel of Record

August 16, 1994